No. 91-1513 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES DEPARTMENT OF THE TREASURY AND
MITCHELL A. LEVINE,
ASSISTANT COMMISSIONER,

Petitioners,

v.

GEORGE FABE, SUPERINTENDENT OF INSURANCE,
STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS CURIAE BRIEF OF JAMES A. GORDON, SPECIAL DEPUTY STATE INSURANCE COMMISSIONER OF MARYLAND FOR RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae, James A. Gordon, a Special Deputy State Insurance Commissioner of Maryland, with powers derived from the Maryland Insurance Code, Md. Ann. Code art. 48A, §§ 133(5), 145, files this Amicus Curiae brief in support of the Respondent. Mr. Gordon is Receiver for Eastern Indemnity Company of Maryland and other insolvent insurance companies in Maryland. Mr. Gordon's interest in this matter originates from his role as plaintiff/appellant in Gordon v. United States Department of the Treasury, 668 F. Supp. 483 (D. Md. 1987), aff'd, 846 F.2d 272, (4th Cir.), cert. denied, 488 U.S. 954 (1988), and continues to the present due to his status as Receiver for other insolvent insurance companies in the State of Maryland.

The primary purpose of Congress in enacting the McCarran-Ferguson Act, 15 U.S.C. §1011 et seq., was to ensure that the regulation of the business of insurance remained a matter of state - not federal - law and that state regulation would be accomplished without federal interference. As this Court has itself recognized, one of the important goals of state insurance regulation is ensuring the solvency of insurance companies. Securities and Exchange Commission v. Variable Annuity Life Ins. Co. of America., 359 U.S. 65, 77 (1959) (Brennan, J., concurring). Indeed, insurance is nothing more than a promise of future payments upon the occurrence of a covered loss, a promise which is completely empty unless the company is viable enough to pay claims at the time of loss. The

comprehensive regulatory procedures of the Maryland Insurance Code, like those in virtually every other state, are aimed at fulfilling the promise of insurance by seeing to it that claims of policyholders, insureds and beneficiaries receive priority payment in the event of insurer insolvency. These state regulations, therefore, enable policyholders to receive the benefits promised by their insurance policies when they otherwise would not, because of the insolvency of the company. Because the ability of an insurer to pay a covered claim is at the heart of the relationship between the insurer and the insured,[1] state insurance code liquidation provisions, designed to assure the reliability and enforcement of insurance policies, do regulate the "business of insurance" and, accordingly, come within the aegis of the McCarran-Ferguson Act's prohibition against federal interference. No greater interference can be imagined than that worked by the federal "super priority" of 31 U.S.C. §3713.

Finally, Mr. Gordon's interest in this case as amicus curiae stems from the existing serious uncertainty with respect to the definition of the term "business of insurance," as it is used in the McCarran-Ferguson Act. This uncertainty exists because the decisions of this Court

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1/ Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 132 (1982) (policyholder's "only concern is whether his claim is paid, not why it is paid.").

interpreting the McCarran-Ferguson Act have not squarely construed the primary purpose of the Act in thirty years. Instead, this Court's recent decisions construing the Act have been confined to the altogether different and secondary antitrust exemption purpose, without clarifying the limited nature of these decisions. Consequently, Mr. Gordon recognizes the need for prompt guidance from this Court to lower federal courts which are ever-increasingly struggling with this important issue.

SUMMARY OF ARGUMENT

A.1. Resolution of the issues presented in this case turns on the meaning of the phrase "business of insurance" which is used, but not defined, in the McCarran-Ferguson Act. The legislative history of the McCarran-Ferguson Act demonstrates congressional concern over insurer insolvency. An insurer's ability to pay its policyholders' claims was considered by Congress to be the "business of insurance" when the Act was passed. In essence, the solvency of the insurer is critical to an insurer fulfilling its promise to pay the policyholder upon the happening of a certain event. See 91 Cong. Rec. 1481 (1945); 90 Cong. Rec. 6526, 6564-65 (1944).

2. Learned treatises also provide well-reasoned analyses of the meaning of the phrase "business of insurance." The payment of losses to policyholders, even in the event of insolvency of the insurer, has been called the raison d'etre of insurance. 2 G. Richards, The Law of Insurance, §207, Selection and Control of the Risk (5th ed. 1952). Scholars consistently link the

assumption of the risk factor with the payment of claims once filed, theorizing that without both of these factors insurance does not exist. Thus, it has been repeatedly expressed in insurance treatises that the goal of insurance regulation is the solvency of insurers. State regulatory procedures designed to fulfill the fundamental goals of insurance through the priority payment of policyholder claims when an insurer becomes insolvent is most decidedly the "business of insurance."

B. Federal courts have directly addressed what activity constitutes the "business of insurance" under the McCarran-Ferguson Act, in cases involving state insurance liquidation receiverships. In deciding whether abstention is appropriate pursuant to Burford v Sun Oil Co., 319 U.S. 315 (1943), these courts consistently respect the comprehensive frameworks enacted by the states to regulate the liquidation of insolvent insurers and the payment of claims against them. The McCarran-Ferguson Act's delegation of insurance regulation to the states has been held to cover state regulation of insolvent insurance companies. Federal Court deference to comprehensive state regulation for insurance company liquidations is probative of the general understanding and interpretation given to the McCarran-Ferguson Act's phrase "business of insurance."

C. The McCarran-Ferguson Act promotes two distinct purposes. The broad, primary purpose was to continue state regulation of the business of insurance. Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979). The secondary, and

narrower, purpose was to give insurance companies a narrow antitrust exemption to enable them to engage in cooperative rate making. Id. The three-prong Pireno test articulated by this Court to define the phrase "business of insurance" in the McCarran-Ferguson Act evolved in response to insurance company attempts to circumvent antitrust laws by invoking the McCarran-Ferguson Act. Each of the three cases decided by this Court, from which the Pireno test derived, involved the secondary antitrust purpose of the McCarran-Ferguson Act and not the primary regulatory purpose of that Act. See Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119 (1982); Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979); Securities & Exchange Commission v. National Securities, Inc., 393 U.S. 453 (1969). The present case involves interpretation of the primary, regulatory function of the McCarran-Ferguson Act. In this context, the test for determining whether the "business of insurance" is involved should give equal recognition to the regulatory purpose of the Act, which includes protection of the ability of the states to fulfill their paramount responsibility in insurance regulation - insurer solvency and payment of policyholder claims even in the event of insurer insolvency.

ARGUMENT

A. THE LEGISLATIVE HISTORY OF THE MCCARRAN- FERGUSON ACT OF 1945 AND LEARNED TREATISES DEMONSTRATE THAT STATE INSURANCE CODE PROVISIONS ESTABLISHING THE PRIORITY FOR PAYMENT OF CLAIMS AGAINST INSOLVENT INSURERS MANIFESTLY REGULATE

THE "BUSINESS OF INSURANCE"

1. In General:

The major premise of the Solicitor General's brief is that through the Supremacy Clause of the United States Constitution,[2] the federal super priority statute[3] preempts Ohio insurance code insolvency provisions governing payment of policyholder and other claims.[4] The Government asserts further that the Ohio statute is not shielded from this preemption by the McCarran-Ferguson Act because it does not specifically relate to the business of insurance.

The correctness of the Government's argument hinges on the definition of the "business of insurance" as set out in the McCarran-Ferguson Act, which states in relevant part:

> (a) The business of insurance,...shall be subject to the laws of the several States...
>
> (b) No Act of Congress shall be contrued to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance... unless such Act specifically relates to the business of insurance.

15 U.S.C. §1012 (emphasis added). The Solicitor General argues that the state insurance code provisions which assign priorities for payment of claims against insolvents do not involve the "business of insurance." Contrary to the Government's belief,[5] this key phrase is not defined in the McCarran-Ferguson Act, and its meaning cannot be determined simply from reading the Act.[6] Accordingly, this Court has instructed that resort to both the legislative history of the Act and

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2/ U.S. Const. art. VI, cl. 2 provides in part: "[T]he Laws of the United States...shall be the supreme law of the land."

3/ 31 U.S.C. §3713.

4/ The Ohio Insurers Supervision, Rehabilitation and Liquidation Act, Ohio Rev. Code Ann. §§ 3903.02(D) and 3903.42 (Anderson 1989).

5/ Brief for Petitioners at 7.

6/ See Fabe v. U.S. Department of Treasury, 939 F.2d 341 at 344 (6th Cir. 1991) ("although the Act exempts from federal preemption only those state regulations which concern the 'business of insurance,' neither the Act nor its legislative history is particularly enlightening as to the meaning of the term.") (citing Securities & Exchange Commission v. National Securities, Inc., 393 U.S. 453, 459 (1969)).

authoritative treatises on insurance are necessary to discern the meaning of this all important phrase. Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 210-212 (1979).

2. The Legislative History:

The Solicitor General's analysis of the legislative history of the McCarran-Ferguson Act[7] does not describe fully the concerns of Congress when enacting the legislation. The legislative history of the McCarran-Ferguson Act demonstrates that Congress recognized that an insurance policy is an empty promise unless the company issuing it is capable of paying claims when made, and that state regulations aimed at this concern did involve the business of insurance. This Court noted such congressional concern in Royal Drug by observing that the Congress which enacted the McCarran-Ferguson Act was aware that the very purpose of insurance regulation was concern over insurer insolvency. Royal Drug, 440 U.S. at 221.

Perhaps the clearest expression of this concern by Congress came from Senator Ferguson, the co-author of the McCarran-Ferguson Act, who addressed it squarely:

> The sale of insurance is not the same as the sale of an article in a store. When one buys an article in a store, he brings it home with him. In the case of insurance, he buys a promise to pay upon the happening of a certain event, and that event may be the burning of his home. If the company is not sound and solvent at the time the house burns, or at the time the claim is made, there is not insurance at all. That is what we have tried to avoid.

91 Cong. Rec. 1481 (1945) (emphasis added). At 90 Cong. Rec. 6564-65 (1944), Representative Vorys remarked:

> The companies have the sacred trust of investing the policyholders' money wisely so as to maintain themselves in position to meet the terms of their contracts, long after the contract is made. This is the feature of the business of insurance which sets it apart from all others. It is always based upon a contract whereby the company must maintain itself in a position to carry out its contracts long after they are written and long after the policyholders have paid their money to the company. One of the problems in the regulation of insurance is to make sure that the company charges enough to remain solvent. One of the dangers affecting insurance is the company that offers too much for too little and then finds itself in a position where it cannot carry out its contracts.

90 Cong. Rec. 6564-65 (1944).

7/ Brief for Petitioners at 19-20.

Representative Hancock also noted the importance of insurer solvency to the "business of insurance":

> The nature of insurance calls for uniformity and a regulation of competition rather than unrestricted competition. Unrestricted competition does not concern itself with the solvency of a seller, for the ordinary commercial transaction is closed with the sale. On the other hand, the writing of an insurance policy contemplates that the insurer will be able to perform in the future, for the promise of indemnity of the insurer must be performed in the future. Therefore, the solvency of the insurer is of prime importance in insurance. It follows that adequacy of rates is even of more importance than low rates.

90 Cong. Rec. 6526 (1944).

The concerns expressed at the time the McCarran-Ferguson Act was enacted continue to exist in Congress today. Congress has recently examined the findings of the Subcommittee on Oversight and Investigations regarding causes of insurance company failures, focusing on insolvencies of property and casualty insurance companies. See Staff of House Comm. on Energy and Commerce, 101st. Cong., 2d Sess., Failed Promises: Insurance Company Insolvencies (Comm. Print 1990). That report stated, relevantly,:

> An insurer's ability to pay--its solvency--must be subjected to proper regulation on a continuing basis, from the time premium payments are accepted until the time all anticipated insured events have occurred. The policyholder must rely on the competency of the regulatory system, as well as the skill and integrity of the insurer, for protection from insolvency.

Id. at 1. The report stated further that "the Federal government does not presently regulate the activities and solvency of insurance companies. Congress delegated this function exclusively to the states through the McCarran-Ferguson Act of 1945...." Id. at 56 (emphasis added). These comments underscore the fact that state regulation of insurance company insolvencies to protect policyholders is part of the "business of insurance."

C. Learned Treatises:

This Court also has recognized that learned treatises provide valuable instruction regarding the scope of the phrase "business of insurance." Royal Drug, 440 U.S. at 211-212. According to 2 G. Richards, The Law of Insurance §207, Selection and Control of the Risk (5th ed. 1952), "it has been stated that 'the fundamental raison d'etre of insurance is to pay losses.'" In other words, for insurance to exist the loss payment facet cannot be divorced from the risk assumption facet.

The assumption and transfer of risk

factor is addressed in 1 G. Couch, Cyclopedia of Insurance Law §1:3 (2d ed. 1984). According to Couch, "a primary requisite essential to a contract of insurance is the assumption of a risk of loss and the undertaking to indemnify the insureds against such a loss." Therefore, the two parts, assumption of a risk of loss and undertaking to actually indemnify against the loss are inseparable. Without both of these factors, there is no insurance.

Another scholar points out that insurance is:

> (1) a social device in that people and organizations help themselves and each other by exchanging relatively small certain premiums for economic security against potentially large losses, (2) involves a large group of people or organizations who are exposed to risks, (3) allows each person or organization who becomes an insured to transfer risk to the whole group, as evidenced by an insurance contract, (4) involves the systematic accumulation of funds through the statistical prediction of losses and calculations of premiums, and (5) pays for losses in accordance with the terms of an insurance contract.

Athearn and Pritchett, Risk and Insurance 44 (5th ed. 1984) (emphasis added).

Finally:

> [I]nsurers promise to pay if and when the event insured against occurs, but payments from buyers are required in advance. Industrial and mercantile companies sell goods usually delivered to the buyers before payment. If an insurer becomes insolvent and is unable to honor its promises, its customers lose not only the purchase price but also resources relied on to replace damaged property, meet liability claims, provide income during periods of disablity, pay medical expenses, or support surviving dependents. Furthermore, persons winning judgments against insureds may be unable to collect damages, creating a social injustice.

Mehr, Cammack and Rose, Principles of Insurance 715 (8th ed. 1985). See also Greene and Trieschmann, Risk and Insurance 524 (6th ed. 1984) (role of State insurance departments in regulating insurer solvency); Vaughan, Fundamentals of Risk and Insurance 144 (4th ed. 1986) (goals of insurance regulation by State are solvency and equity to insureds); Denenberg, Eilers, Melone and Zelten, Risk and Insurance 618-19 (2d ed. 1974) ("there are some who believe that solvency should be the only objective of insurance regulation"); Rejda, Principles of Insurance 565 (1982) (in which the author points out that state regulation of insurance company solvency includes requirements to maintain solvency, as well as procedures to fulfill the fundamental

goals of insurance once a company becomes insolvent).

As the legislative history of the McCarran-Ferguson Act and learned commentary demonstrate, insurance does not exist unless payment is received by the policyholder for a valid claim. Senator Ferguson's simple and straightforward observation, quoted above, is at the heart of what every person who buys insurance knows - you have bought no protection at all unless at the time a loss occurs a claim payment is made. However intellectually satisfying it may be to argue that the transfer of risk actually occurs at the time the policy is issued and not when a claim is paid, such analysis does not go far in comforting an insured who has suffered a covered loss, but cannot be paid because the insurance company is insolvent. Where the state endeavors to fulfill the promise of insurance by taking over the failed insurer and giving priority to the payment of policyholder claims, it tortures common sense to say this is unrelated to the "business of insurance." To openly make this argument in the hope of augmenting the Treasury of the United States at the expense of individual citizen insureds, when the Government's claim originates from its status as a policyholder or insured, and not as a sovereign, is as callous as it is unpersuasive.

B. THE MEANING OF THE PHRASE "BUSINESS OF INSURANCE" MAY ALSO BE DETERMINED BY REVIEWING FEDERAL ABSTENTION CASES

A significant number of federal courts have addressed the question of what

constitutes the "business of insurance" in the context of resolving motions to abstain from exercising federal jurisdiction in cases involving state insurance liquidation receiverships. As the Sixth Circuit Court of Appeals recognized, the reasoning employed in these cases also is helpful in understanding what the phrase "business of insurance" means. Fabe, 939 F.2d at p. 16. In these abstention cases the federal courts employed the Burford doctrine,"[8] and abstained from exercising federal jurisdiction because they were mindful that state efforts to regulate the winding up of insolvent insurance companies and the payment of claims by policyholders was the business of insurance for purposes of the McCarran-Ferguson Act. Although these cases did not decide the precise issue presented here, they demonstrate why both logic and fairness compel the conclusion that state insurance regulations designed to promote payment of policyholder claims are central to the business of insurance.[9]

8/ Burford v. Sun Oil Co., 319 U.S. 315 (1943).

9/ The government itself refers to cases decided in the context of resolving issues not directly involving the interpretation of the McCarran-Ferguson Act, but which shed light on what the "busines of insurance" is. Brief for Petitioners at 17, citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) (interpreting ERISA) and Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724

In Barnhardt Marine Insurance, Inc. v. New England International Surety of America, Inc., 961 F.2d 529 (5th Cir. 1992), the Fifth Circuit recently declared Burford abstention appropriate in a federal action brought against an insurance company which was the subject of ongoing state liquidation proceedings when the federal case was brought. Barnhardt, 961 F.2d 529, 531. The Fifth Circuit Court of Appeals recognized two circumstances in which the application of the Burford doctrine is appropriate: when difficult state law questions of policy are present which are of substantial and far-reaching public concern and when the exercise of federal jurisdiction over the question involved would disrupt state efforts to set a uniform policy on a matter of substantial public concern. Id. The court decided that "Louisiana's insurance laws provide a comprehensive framework for the liquidation of insolvent insurance companies and the resolution of claims against them." Id.; see also Martin Insurance Agency, Inc. v. Prudential Reinsurance Co., 910 F.2d 249 (5th Cir. 1990). Finally, the court declared that by allowing Barnhardt to recover the same assets, litigation of Barnhardt's claims in federal court would usurp Louisiana's control over the liquidation proceeding by allowing Barnhardt to preempt others in the distribution of NEISA's assets. Barnhardt, 961 F.2d at 932.

In Hartford Casualty Insurance Co. v. Borg-Warner Corporation, 913 F.2d 419 (7th Cir. 1990), the Seventh Circuit affirmed the

(1985) (also interpreting ERISA).

dismissal of an action against the parent company of an insolvent insurer based on abstention.[10] The Borg-Warner court determined that under the regulatory power given to the states by the McCarran-Ferguson Act over insurance, states have enacted legislation to regulate the rehabilitation and liquidation of insolvent insurers. Borg-Warner, 913 F.2d at 426. Therefore, the court decided the states had a "paramount interest" over anyone else in the regulation of a uniform rehabilitation process.

> With the McCarran-Ferguson Act stating congressional policy that insurance regulation is up to the states, it is difficult to understand how Hartford can maintain that a federal court should entertain a lawsuit where it will have to decide the amount and existence of liability that an insolvent Illinois insurer owes to Hartford.

Borg-Warner, 913 F.2d at 426.

The Seventh Circuit Court of Appeals in Borg-Warner relied heavily on the Tenth Circuit's recent look into the issue of federal court abstention in the context of a

10/ The district court also had dismissed the action on ripeness and standing issues, however the Seventh Circuit found the case to be "best understood in terms of abstention." Borg-Warner, 913 F.2d at 424.

state statutory scheme of regulating insolvent insurance companies. Grimes v. Crown Life Insurance Co., 857 F.2d 699 (10th Cir. 1988), cert. denied, 489 U.S. 1096 (1989). The Tenth Circuit Court of Appeals referred to "traditional federal deference provided to state receivership proceedings,"[11] which when considered in conjunction with "complex and comprehensive procedures adopted for the liquidation of insolvent insurers pursuant to the provisions of the McCarran Ferguson Act," allowed the court to decline to exercise jurisdiction over a suit between the state liquidator of an insolvent insurer and a reinsurer. Grimes, 857 F.2d at 703-704.

The Second Circuit has repeatedly affirmed the application of Burford abstention by federal district courts who have declined to exercise jurisdiction over actions involving insolvent insurance companies. See Corcoran v. Ardra Ins. Co., Ltd., 842 F.2d 31 (2nd Cir. 1988); Law Enforcement Ins. Co., Ltd. v. Corcoran, 807 F.2d 38 (2nd Cir. 1986) cert. denied, 481 U.S. 1017 (1987); Levy v. Lewis, 635 F.2d 960 (2nd Cir. 1980). In each of these three cases, the Second Circuit Court of Appeals

11/ For the cases cited by the Tenth Circuit, see Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 294 U.S. 189 (1935); Commonwealth of Pennsylvania v. Williams, 294 U.S. 176 (1935); Duggins v. Hunt, 323 F.2d 746 (10th Cir. 1963); Inland Empire Insurance Co. v. Freed, 239 F.2d 289 (10th Cir. 1956).

acknowledged approvingly New York's "complex administrative and judicial system for regulating and liquidating domestic insurance companies." Levy v. Lewis, 635 F.2d at 963, quoted in Corcoran v. Ardra Ins. Co., Ltd., 842 F.2d at 37 and in Law Enforcement Insurance Co., Ltd. v. Corcoran, 807 F.2d at 44. Deferring to state procedures with respect to insurance liquidations pursuant to the McCarran-Ferguson Act was found to be mandated by that Act and, in fact, proper in light of its "express federal policy of noninterference in insurance matters." Levy v. Lewis, 635 F.2d at 963, quoted in Law Enforcement Insurance Co., Ltd. v. Corcoran, 807 F.2d at 44; see also Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co., 864 F.2d 1033 (3rd Cir. 1988) (applying Burford abstention in an action by an asbestos seller against an insurer placed in liquidation).

The holdings reached in these cases illustrate the logic of the conclusion that state regulations governing the payment of policyholder claims through insolvency proceedings does come within the purview of the "business of insurance" as Congress intended that phrase to be interpreted in the McCarran-Ferguson Act. While, admittedly, they did not involve super-priority claims by the government filed with insolvent insurer receiverships, they did involve questions much more closely related to those presented in this case than those which were involved in the trilogy of cases

which produced the three part Pireno test.[12]

C. THE UTILITY OF THE PIRENO TEST AS THE SOLE TEST TO DETERMINE WHAT IS THE BUSINESS OF INSURANCE IS QUESTIONABLE IN CASES INVOLVING THE PRIMARY, REGULATORY FUNCTION OF THE MCCARRAN-FERGUSON ACT

When determining what is meant by the phrase "business of insurance" in the McCarran-Ferguson Act, the fact that the Act was intended to further two distinct goals should not be overlooked. The primary purpose of the McCarran-Ferguson Act was to ensure continued state regulation of the business of insurance. Royal Drug, 440 U.S. 205, 217-218. Congress' goal in passing the statute was "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 429 (1946) (emphasis supplied). Therefore, in cases involving the primary purpose of the Act, it should be appropriate to broadly interpret the meaning of the phrase "business of insurance" in order to fulfill its primary purpose. In contrast, there was a secondary and more narrow purpose Congress had in mind when the Act was passed, and that was to provide a narrow antitrust exemption to insurance companies to enable them to engage in

12/ Pireno, 458 U.S. 119; Royal Drug, 440 U.S. 205; National Securities Inc., 393 U.S. 453.

cooperative rate making, which otherwise would have violated antitrust laws. Royal Drug, 440 U.S. at 218 n. 18.

The narrow antitrust exemption of the McCarran-Ferguson Act, constitutes only a secondary purpose of the Act. Royal Drug, 440 U.S. at 218 n. 18. Significantly, exemptions from the antitrust laws are to be narrowly construed. Id. at 231. This, too, makes perfect sense. When enacting the McCarran-Ferguson Act, Congress wanted to preserve and encourage the ability of states to regulate insurance without federal interference, but did not want to concomitantly allow insurance companies to take advantage of the antitrust exemption provisions of the Act to engage in anti-competitive activity. Congressional concern that insurance companies, given an inch, might try to take a mile, was not misplaced. All three of the cases decided by this Court in the development of the Pireno test arose from efforts by insurance companies to use the McCarran-Ferguson Act as a shield to protect against charges of antitrust activity.[13] The three part Pireno test properly evolved as a bar to such efforts by insurance companies to circumvent antitrust laws by invoking the protection of

13/ Pireno, 458 U.S. 119 (alleged conspiracy to eliminate price competition among chiropractors); Royal Drug, 440 U.S. 205 (agreements to fix the retail prices of drugs and pharma-ceuticals); National Security, 393 U.S. 453 (merger of two insurance companies).

the McCarran-Ferguson Act, and this Court recognized the fact that this was the context in which the test was being employed. "[T]he only issue before us is whether petitioners' peer review practices are exempt from antitrust scrutiny as part of the 'business of insurance.'" Pireno, 458 U.S. 119, 126 (emphasis supplied). Further, this Court has often repeated that exemptions from antitrust laws are to be narrowly construed, while at the same time recognizing that this secondary purpose of the McCarran-Ferguson Act was quite distinct from its primary purpose of preserving state regulation of the business of insurance. Royal Drug, 440 U.S. at 218 n. 18.

While it may go too far to suggest that the Pireno test for the meaning of the phrase "business of insurance" in the McCarran-Ferguson Act should be limited only to the context of cases interpreting the antitrust exemption of that Act,[14] it also should not be adopted as the exclusive test for defining that phrase, particularly with regard to cases such as this, which involve

14/ Indeed, this Court has, on several occasions, looked to the Pireno test to determine what the business of insurance encompassed in contexts other than the interpretation of the McCarran-Ferguson Act. Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) (interpretation of the Employee Retirement Income Security Act of 1974 (ERISA)); Metropolitan Life Insurance Co. v. Massachuetts, 471 U.S. 724 (1985) (interpreting ERISA).

the primary-regulatory purpose of the Act. Instead, this Court should employ a test which gives equal recognition to the unique characteristics of the promise embodied by an insurance policy, the efforts by state insurance regulators to fulfill that promise by adopting measures to effect the priority payment of policyholder claims in insurance company receiverships, and the intent of Congress that states should be able to engage in this type of regulation without federal interference. In cases such as this, where the superpriority claim of the United States to assets of an insolvent insurance company arises from its status as the beneficiary or insured under an insurance policy or surety bond, and not as a sovereign,[15] then the state insurance activity in question does involve the "business of insurance," and the McCarran-Ferguson Act's protections should fully apply.

15/ An example of when a claim by the government would be in its sovereign capacity would be a tax claim filed against an insolvent insurer.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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